PATHMANATHAN KUMARASAMY v. PP

HIGH COURT MALAYA, TAIPING
MOHAMED ZAINI MAZLAN JC
[CRIMINAL APPEAL NO: 42S-20-08-2012]
10 JUNE 2016

CRIMINAL PROCEDURE: *Trial – Conduct of trial – Continuation of trial before new judge – Non-compliance with s. 261 of Criminal Procedure Code – Whether appellant prejudiced – Whether reason given as to why previous judge could not continue presiding over case – Whether non-compliance curable*

The appeal herein was in respect of the conviction and sentence of the appellant. The appellant was charged at the Sessions Court for two offences, one under s. 409 of the Penal Code ('PC') and the other under s. 471 read with s. 467 of the PC. At the end of the prosecution's case, the appellant was acquitted and discharged in respect of the latter charge, but was called to enter his defence in respect of the other charge. The appellant was subsequently found guilty and sentenced to eight years jail and one stroke of whipping. The Sessions Court Judge ('SCJ') who initially presided over the trial was Meor Sulaiman, who heard the evidence of three of the prosecution witnesses. However, the trial could not be concluded and was scheduled to continuation. Subsequently, the case came up for trial before another SCJ, Azuar Che Yusof. The appellant requested for the previous judge to continue and the judge fixed another mention date. However, the notes of proceedings for the mention date did not indicate as to what had happened to the appellant's request to have the previous judge to continue presiding over the trial. The ground considered by the court in this appeal was that the provisions of s. 261 of the Criminal Procedure Code ('CPC') was not adhered to and had prejudiced the appellant.

Held (allowing appeal; setting aside conviction by Sessions Court):

(1) Although s. 261 of the CPC makes provision for the succeeding judge to continue presiding over the case, it is only applicable if the previous judge had ceased to have jurisdiction. There was no reason given to the appellant as to why the previous judge could not continue presiding over the case. The appellant had indicated his wish to be tried by the previous judge and although he was told to make an application, there was no record to indicate whether the application had been made and if so, the outcome. (paras 14, 16 & 17)

(2) A presiding judge that has heard and seen a witness is able to record the demeanour of a witness, particularly when the witness was subjected to cross-examination. In this case, the prosecution's material witness had already completed giving evidence. The succeeding judge would not have the audio-visual benefit of this particular witness, which was a material advantage that the previous judge had. (para 20)

(3) The appellant was entitled to have the procedure adhered to. An infraction of his rights to a fair trial was not curable. Hence, the conviction against the appellant was not safe as he had been prejudiced in his rights to have a fair trial. (paras 23 & 24)

Case(s) referred to:
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Mohamed Idris Hj Mohamed Said v. Rex [1948] 1 LNS 35 HC ***(refd)***
Ramadas Kelu Naik v. VM Muddayya 1978 Cri LJ ***(refd)***
Teay Wah Cheong v. PP [1963] 1 LNS 142 HC ***(refd)***
Yap You Jee v. PP & Other Appeals [2015] 7 CLJ 897 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 261
Penal Code, ss. 409, 467, 471

For the appellant - Gobind Singh Deo; M/s Gobind Singh Deo
For the defendant - Hidayatul Syuhada Shamsudin; DPP

Reported by S Barathi

JUDGMENT

Mohamed Zaini Mazlan JC:

Introduction

[1] The appellant, an advocate and solicitor, was initially charged with two offences, with one under s. 409 of the Penal Code ('PC'), and the other under s. 471 read with s. 467 of the PC, at the Taiping Sessions Court. The Sessions Court had at the end of the prosecution's case, acquitted and discharged the appellant in respect of the latter charge, but called for him to enter his defence in respect of the other charge.

[2] The amended charge against him under s. 409 of the PC reads as follow:

> Bahawa kamu di antara 16 April 2002 hingga 18 Julai 2002 di pejabat Tetuan Mawar Nathan & Co No. 5, 1st Floor, Jalan Harmoni, Pusat Bandar Bagan Serai, dalam Daerah Kerian, di Negeri Perak sebagai seorang ejen iaitu rakan kongsi Mawar Nathan & Co. dan dalam kapasiti tersebut telah diamanahkan dengan penguasaan ke atas harta tertentu, iaitu wang berjumlah RM100,000 telah melakukan pecah amanah jenayah berkaitan harta tersebut dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 409 Kanuri Keseksaan.

[3] He was found guilty, and sentenced to eight years jail and one stroke of whipping. His appeal is in respect of the conviction and sentence.

Brief Facts

[4] The appellant was at the material time, a partner in the firm of Mawar, Nathan & Co ('the firm'). The firm handled a sale and purchase transaction of a house situated in Batu Gajah, Perak.

[5] The sale and purchase was between two individuals. The agreed price for the house was RM140,000. Both individuals entered into a sale and purchase agreement dated 26 June 2001. The purchaser had initially paid RM40,000, leaving a balance of RM100,000.

[6] The balance was paid for by the purchaser through two post-dated cheques, and deposited with the firm. These two cheques however, were for the sum of RM70,000 and RM50,000 respectively, the total of which was RM20,000 more than the balance price. According to the purchaser, the excess RM20,000 was to repay the loan taken from the appellant, the reasons of which will not be elaborated, as nothing turns on it.

[7] The problem arose, when the seller did not receive the balance purchase price from the firm. She then confronted the partners of the firm, and demanded for the balance of the purchase price to be paid to her. Subsequently, the appellant and his partner from the firm, went to seller's house and gave her a fixed deposit receipt issued by Arab-Malaysian Bank of the Taiping branch in her name for RM100,000. The fixed deposit receipt turned out to be fake.

[8] The buyer then appointed a firm of solicitors, to demand from the firm the balance purchase price. Some attempts were made by the appellant to pay, but it fell short of whole amount payable.

The Trial

[9] The learned Sessions Court Judge that had initially presided over the trial was Meor Sulaiman Bin Ahmad Tarmizi. The trial commenced on 25 October 2010. The learned Sessions Court Judge had heard the evidence of three of the prosecution's witnesses, namely, the complainant, an officer from the Public Bank, and an officer from the Arab-Malaysian Bank, from 25 October 2010 to 26 October 2010. The trial could not be concluded, and was scheduled for continuation from 6 January 2011 to 7 January 2011.

[10] Prior to the date for continuation, the case came up for hearing of encl. 23 on 10 November 2010, before the same judge, and that an order in terms of the application was granted. Unfortunately it was not indicated in the notes the nature of the application heard.

[11] The case was then called Op for mention of encl. 41 on 14 December 2010. On this date, a new judge, Azuar bin Che Yusof, presided in that court. The notes indicated the hearing of encl. 41, but again there was no indication of the nature of the application; save that an order in terms was granted.

[12] When the case eventually came up for trial as scheduled on 6 January 2011, the prosecution indicated that they were ready to proceed. The appellant, who had represented himself, requested for the previous judge to continue. The relevant part of the notes of proceedings is as follows:

A Coram: Azuar Bin Che Yusof.
Tarikh: 06 Januari 2011.

Timbalan Pendakwa Raya: Loo Jia bersama Farhan. Tertuduh hadir Mohon bicara.

B Timbalan Pendakwa Raya:
Kes untuk sambung bicara, kami bersedia.

Tertuduh:
Jika diizinkan saya pohon Tuan Meor.

C Mahkamah: Buat surat permohonan.
14/2/11 (Sebutan).
Jaminan dilanjutkan.
Azuar bin Che Yusof.

[13] The notes of proceedings for the mention date of 14 January 2010 only showed that the appellant's letter was referred to, and that new trial dates D were fixed. There was no indication as to what had happened to the appellant's request to have the previous judge to continue presiding over the trial.

Findings

[14] Although the appellant had submitted a few grounds, I had allowed the E appeal on one ground alone, which was this: that the provision of s. 261 of the Criminal Procedure Code was not adhered to, and had prejudiced the appellant.

[15] The section concerned reads as follows:

F 261. Change of Magistrate during hearing

Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction in it and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence by his G predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial:

Provided as follows:

(a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of H them be re-summoned and re-heard;

(b) the High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was had, if that Court is of the opinion that the accused has been materially prejudiced thereby, and may order a new trial. I

[16] In this case, there was no reason given to the appellant, as to why the previous judge could not continue presiding over the case. The appellant had already indicated his wish to be tried by the previous judge. Although he was told to make an application, there was no record to indicate whether the application had been made, and if so, the outcome.

[17] Although s. 261 CPC makes provision for the succeeding judge to continue presiding over the case, that in my opinion is only applicable, if the previous judge had ceased to have jurisdiction, as stated in the section itself. The appellant was entitled to know, whether this was indeed the case, or otherwise.

[18] The Court of Appeal had in the case of *Yap You Jee v. PP & Other Appeals* [2015] 7 CLJ 897; [2015] 5 MLJ 334, held that s. 261 CPC does not apply in the case of a Magistrate or Sessions Court Judge being transferred to another state, and that a Magistrate (and Sessions Court Judge), ceases to have jurisdiction in a criminal case by his untimely death, retirement or resignation. The succeeding judge here should have recorded the reasons for the change of judge and informed the accused.

[19] In *Ramadas Kelu Naik v. VM Muddayya* 1978 Cri LJ, it was held, that it is a cardinal principle of law in criminal trial, that it is a right of an accused that his case be decided by the judge who had heard the whole case. In my view, this is particularly crucial where the previous judge had heard the evidence of material witnesses.

[20] In this case for instance, the prosecution's material witness, namely the complainant, had already completed giving evidence. The succeeding judge would not have the audio-visual benefit of this particular witness, which is a material advantage that trial judges have. A presiding judge that has heard and seen a witness, is able to, for example, record the demeanour of a witness, particularly when the witness was subjected to cross-examination.

[21] I am fortified in my view with the case of *Teay Wah Cheong v. PP* [1963] 1 LNS 142; [1964] 30 MLJ 21. The following extract of the judgment by Hashim J is most instructive:

> Finally, may I point out the danger of acting under s. 261 of the Criminal Procedure Code. In this case a President of the Sessions Court recorded evidence of eight witnesses. He was then succeeded by the present President of the Sessions Court. The present President recorded further evidence and came to a finding. In this grounds of judgment the learned President stated there was in fact only one eye-witness to the accident, presumably the wife of Abdul Salam whose evidence was recorded by the former President. *Unless it would cause hardship and great inconvenience to the accused person and witnesses I think it is much better for a President or a Magistrate to hear the case ab initio rather than take over the recording of evidence from the*

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other President or Magistrate. For one thing the succeeding President or Magistrate cannot assess the value of evidence recorded by his predecessor vis-a-vis the credibility of the witness.

(emphasis added)

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[22] The same reasoning was given in *Mohamed Idris Hji Mohamed Said v. Rex* [1948] 1 LNS 35; [1949] 15 MLJ 31. This was also a case where the succeeding Magistrate had taken over the case without recalling the witnesses heard by the previous Magistrate. Murray-Ansley CJ held the following:

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When the case came before me on appeal I did not consider that the trial could be regarded as satisfactory. The power given under the section is of value, particularly when it is used for evidence of a more or less formal character, or where the witness cannot be produced. *In the present case, the witness whose evidence was so acted on was a crucial one, and I cannot think that a decision can be regarded as satisfactory where it is based on evidence given before another Magistrate, particularly when there is nothing to prevent the witness from giving evidence on the further hearing.* (emphasis added)

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[23] The appellant was entitled to have the procedure adhered to. An infraction of his rights to a fair trial is not curable. The Federal Court in *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301, held as follows:

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Drawing the threads together, it is clear from the authorities that it is a fundamental right guaranteed by art. 5(1) that a person's life (in its widest sense) or his or her personal liberty (in its widest sense) may not be deprived save in accordance with state action that is fair both in point of procedure and substance. Whether an impugned state action is substantively or procedurally fair must depend on the fact pattern of each case. However, when the principle is applied to a criminal case, what it means is that an accused has a constitutionally guaranteed rights to receive a fair trial by an impartial tribunal and to have a just decision on the facts. If there is an infraction of any of these right, the accused is entitled to an acquittal.

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[24] For these reasons, the conviction against the appellant is not safe, as he had been prejudiced in his rights to have a fair trial. The appellant's appeal is therefore allowed, and the conviction by the Sessions Court set aside.

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